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5 **IN THE COMPETITION**

Case No: 1304/7/7/19 & 1305/7/7/19

6 **APPEAL TRIBUNAL**

7  
8 Salisbury Square House  
9 8 Salisbury Square  
10 London EC4Y 8AP  
11 (Remote Hearing)

12 Thursday 18 November 2021

14 **Before:**

15 The Honourable Mr Justice Roth  
16 Simon Holmes  
17 Professor Robin Mason  
18 (Sitting as a Tribunal in England and Wales)

20 **BETWEEN:**

21 Justin Gutmann

22 **Class Representative**

23 v

24 First MTR South Western Trains Limited and Another

25 **Defendant**

26 AND

27 Justin Gutmann

28 **Class Representative**

29 v

30 London & South Eastern Railway Limited

31 **Defendant**

32  
33  
34  
35  
36  
37  
38 **A P P E A R A N C E S**

39 Philip Moser QC, Stefan Kuppen and George McDonald (On behalf of Justin Gutmann)  
40 Tim Ward QC and James Bourke (On behalf of First MTR)  
41 Sarah Abram (On behalf of Stagecoach)  
42 Paul Harris QC, Anneliese Blackwood and Clíodhna Kellehger (On behalf of LSER)

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1  
2 **Case Management Conference**

3 **(9.40 am)**

4 **MR JUSTICE ROTH:** Good morning.

5 I start, as always, with the warning that although being heard remotely, this is of  
6 course a full Tribunal hearing as much as if it was held in person in the  
7 courtroom in Salisbury Square House where two of the three members of the  
8 Tribunal are sitting -- the third, Professor Mason, is joining remotely -- and it's  
9 strictly forbidden for anyone to make any unauthorised recording or take any  
10 image of the proceedings, and to do so is punishable as a contempt of court.

11 Thank you for all the written submissions you have given us. We start -- the first  
12 item on the agenda is the question of the class definition and whether season  
13 ticket fares should be clearly excluded or included in the definition.

14 Mr Moser, you are saying that they should be included, as I understand it?

15 **MR MOSER:** That is correct, sir. Before I start about season tickets, there is a short  
16 item of housekeeping on another aspect of the order, which is to do with the  
17 Draft CPO Notice, which is now at new tab 26.1. The solicitors, I think, for  
18 LSER very helpfully spotted a few typographical errors.

19 **MR JUSTICE ROTH:** Yes.

20 **MR MOSER:** I just draw the Tribunal's attention to the fact they are all agreed and  
21 that draft notice is now, as I understand it, uncontroversial form, in the format  
22 as corrected at 26.1.

23 **MR JUSTICE ROTH:** Right.

24 **MR MOSER:** I just point that out in opening.

25 **MR JUSTICE ROTH:** Yes.

26 **MR MOSER:** Because other than that, and other than the matters on directions and

1 so forth, I am not proposing, nor invited to, address the Tribunal on all of the  
2 other aspects of the Draft Order which we've heard nothing further, and so we  
3 assume that those aspects not specifically in dispute today are agreed, and if  
4 they are not, then somebody will no doubt speak up.

5 **MR JUSTICE ROTH:** Yes, we will revisit the Order when we decide on permission  
6 to appeal.

7  
8 **Submissions by MR MOSER**

9 **MR MOSER:** Sir, yes.

10 Season tickets. So, our proposal, and indeed it is our case that this was always so,  
11 that the class definition should include season tickets, and indeed that it  
12 requires no particular amendment from its current form, although for the  
13 avoidance of doubt, one could add "and season tickets" at the very end.

14 We derive that, sir, from the expert evidence. And if I could ask you, please, to turn  
15 up Mr Holt's first report in just two places. That is now at CMC bundle 2,  
16 tab 15, page 701. It starts at 677, but the relevant section is at 701.

17 **MR JUSTICE ROTH:** Can you give me the paragraph reference?

18 **MR MOSER:** Yes, it's paragraph 3.2.32, and the table within it. So, we have the  
19 table setting out the possible journeys and types of fares that are included in  
20 the claim, i.e. meeting the conditions and limitations outlined above; and  
21 table 3.4, identification of in-scope journeys, and we have under "fare type",  
22 single and return and season fares.

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** In note 1, that says:

25 "This includes any time, off-peak, advance, single, return, first-class, standard, adult,  
26 child or other status discounts and season fares (weekly, monthly, annual),

1 but excludes pay as you go."

2 Then as we know, sir, in fact season fares were excluded from the calculation. That

3 is explained at page 746 and paragraph 6.2.16, where Mr Holt said:

4 "I include entries relating to both full and reduced fare journeys, but exclude those  
5 relating to season fares on the basis that the majority of season fares will be  
6 for inbound journeys, e.g. commuting into Central London, which are out of  
7 scope. Note that this does not mean a season ticket holder travelling from  
8 within the TFL travel zone to a destination outside of London could not have  
9 suffered harm or would be outside of the scope of the class."

10 So, pausing there, it is the difference between inbound season ticket holders and  
11 outbound season ticket holders that matters, simply because that's the  
12 definition of the class. We are only looking at people who bought fares  
13 travelling out of London, including return fares, and not travelling in.

14 There is then a comment, which is:

15 "As noted above at paragraph 3.2.21, I understand that a season fare from London  
16 to a destination outside the TFL travel zone cannot be combined with  
17 a Travelcard to give a boundary saving."

18 That's just a statement of fact.

19 So it's one of those egregious instances where there simply isn't a boundary fare at  
20 all. There is a qualification in the next sentence, which is:

21 "However, an individual could purchase a season fare from a station within the zone  
22 furthest from Central London covered by their Travelcard in order to minimise  
23 the cost of the season fare."

24 Again, pausing there, that's perhaps somewhat akin, and I think that's what you  
25 meant -- what the Tribunal meant in the judgment, that there is a similarity to  
26 point-to-point here; you could mitigate by buying, as it were, a point-to-point

1 season fare.

2 But what Mr Holt derives from that is, he indicates a loss could be incurred in relation  
3 to some season fares. It's exactly the same as with all fares, sir, in this case,  
4 that if one had but known, one could have tried to mitigate in some way, but --

5 **MR JUSTICE ROTH:** Yes.

6 **MR MOSER:** -- nobody of course has advertised the fare, indeed it is non-existent  
7 as the boundary fare:

8 "... therefore excluding season fares in my quantum calculations, a conservative  
9 assumption."

10 That may be the sentence that has led to the discussion, but as we've explained in  
11 our written submissions and as we say is really quite clear in the report, what  
12 Mr Holt has done is he has excluded season fares from the quantum  
13 calculation as a conservative device.

14 There has not been disclosure yet. We just don't know what the quantum would be  
15 of that. It might be quite slight, but it's not in there, not because it's not in  
16 scope; it's just not in there as a conservative assumption.

17 **MR JUSTICE ROTH:** But isn't part of the problem then, Mr Moser -- disclosure will  
18 no doubt tell you how many season fares were purchased; it may tell you in  
19 more granular detail from which stations and so on. So you get the  
20 information about season fares, but to calculate aggregate damages in  
21 respect of seasons, there is the issue of the overlap problem, which everyone  
22 recognises, including Mr Holt, is challenging. He has explained in great detail,  
23 and very helpfully, how he deals with the overlap with regard to a single ticket  
24 and developed a method which we all looked at.

25 He has not done that, and has not attempted to do that, for season tickets. And  
26 season tickets do give rise to particular problems regarding the overlap, as

1 brought out, I think, in the respondents' Skeleton Arguments, particularly that  
2 of Mr Ward and his team for First MTR, because a season ticket, by definition,  
3 is a period ticket; a Travelcard may be for a different period or for a day, and it  
4 really gives rise to a whole other lot of difficulties.

5 Now, there might be a method of looking at that, but Mr Holt, because he's excluded  
6 them, has not addressed his mind to that. So we just don't know and we have  
7 not been able to assess whether it's a credible method, whether it passes  
8 what may not be the highest test at this stage, but still there is a test of  
9 whether it is a credible and plausible method for dealing with it.

10 **MR MOSER:** I can see that, and that is the most powerful point and with all credit to  
11 Mr Ward, he, in my submission, makes the more important point. There's  
12 another point about rights of defence and so on, which I can deal with, but  
13 I submit, with great respect for the other defendants, that that is not the  
14 problem.

15 The only thing that is missing in the methodology in terms of season tickets is, as far  
16 as we can tell at the moment, without disclosure, is an attempt at splitting the  
17 numbers of season tickets between those originating in London and those  
18 originating outside. That's probably the maximum that could have been done  
19 had season tickets been included, so that you have an idea of the overall  
20 percentage of this whole issue. It may be great or small.

21 **MR JUSTICE ROTH:** Yes.

22 **MR MOSER:** As far as the more granular issues are concerned that Mr Ward  
23 addresses, and citing also his client, Mr Cameron, the point is, to some  
24 extent, well taken about: well, when did you have a Travelcard? The  
25 sequencing of fare purchases is going to be challenging -- more challenging  
26 for season fares than ordinary fares. This is First MTR's at least point.

1 First MTR say: at least, at the very least we should only include season ticket  
2 purchases, where a Travelcard had already been purchased.

3 Now, if the Tribunal found that attractive, we wouldn't object to that; or a better  
4 definition, in my submission, would be where a Travelcard is held for the  
5 whole duration of the season ticket. That would take care of the partial  
6 temporal overlap points that are being made, and it would also take care of  
7 the sequencing issue, in my submission.

8 As for the issue around, well, Mr Cameron says it's a one-off benefit for a one-off  
9 journey; with respect, that's his view, but he says the customer could buy an  
10 outboundary Travelcard. Well, that may be true for the people who are  
11 travelling on the kind of journey that is already excluded from the class, but  
12 there are many scenarios where London residents will have a Travelcard  
13 continuously, but only require a rail season ticket as an add-on every now and  
14 then, like the example in our case of someone working for a project location  
15 out of London every day for a week. So if one thinks of that example they  
16 have the Travelcard before they ever get the season ticket, and they travel out  
17 and the calculation works straightforwardly.

18 **MR JUSTICE ROTH:** So you are accepting the limitation that it should be where  
19 they have a Travelcard for the whole duration of the season ticket?

20 **MR MOSER:** Sir, yes.

21 **MR JUSTICE ROTH:** Yes.

22 **MR MOSER:** I can see the force of what Mr Ward says there.

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** I say that takes care of partial temporal overlap; that takes care of  
25 sequencing of fare purchases.

26 As for the final point of principle is, well, there is not yet a settled methodology for

1           them working it out in the same way. Well, that I submit, on this point,  
2           simply -- it does not need to be at this stage worked out to that level of  
3           granularity, for the purposes of certification. As the judgment says, at this  
4           stage, we do not have to bring our entire case on methodology. This is, on  
5           any view, a detail.

6 If this is to remain included, the time for that argument will be after disclosure, sir,  
7           when --

8 **MR JUSTICE ROTH:** Can I just interrupt you? Because the other part of season  
9           tickets is, of course, working out the potential loss because there isn't  
10          a boundary season ticket --

11 **MR MOSER:** No.

12 **MR JUSTICE ROTH:** -- as everyone understands.

13 Now, Mr Holt has given a method by which he works out the loss for those tickets for  
14          which there is no boundary fare, by using a proportional approach, which he  
15          applies extrapolating from those cases where there is a boundary fare and --  
16          just give me one moment -- where he has explained how he does that. I think  
17          it's at -- is it -- yes, it's at 6.2.49 of his first report, where he takes  
18          a proportional saving from those tickets for which there is a boundary fare --  
19          those journeys for which there is a boundary fare, and then applies that  
20          proportion to extrapolate what the boundary fare would be for types of ticket  
21          for which there is no boundary fare. And one can understand that.

22 The other question is whether there is something about the way season tickets are  
23          priced that might make this -- I don't know if this is the method he would use  
24          for season tickets, or whether it would be a different method; and if so, what.

25 **MR MOSER:** No further evidence was permitted at this stage so --

26 **MR JUSTICE ROTH:** Yes.

1 **MR MOSER:** -- I tread very carefully. My submission is that the same would apply  
2 here in practice, that the season ticket price is calculated as a set of multiple  
3 single journeys, so it's not beyond the wit of man or Mr Holt to break those out  
4 into a valuation. And we see that in the current methodology at 6.2.49 there is  
5 a stage where the equivalent boundary fare does not exist.

6 **MR JUSTICE ROTH:** Yes.

7 **MR MOSER:** So it's not, in principle, different.

8 **MR JUSTICE ROTH:** Yes, well, this is -- 6.2.49 is to deal with the cases where an  
9 equivalent boundary fare does not exist --

10 **MR MOSER:** Yes.

11 **MR JUSTICE ROTH:** -- that's what it's all about.

12 **MR MOSER:** Exactly. So we do say the same applies --

13 **MR JUSTICE ROTH:** Yes, you say there's a method that could work. So that's,  
14 I think, the first point. The other point that is raised is that really everyone --  
15 whatever the literal reading of the class definition might be, and the passages  
16 in Mr Holt's report you have drawn attention to, that actually at the hearing  
17 everyone was proceeding on the assumption that season tickets are  
18 excluded.

19 The Tribunal was under that assumption, and as you know, that led to the draft  
20 judgment saying so, until you raised the point in response. But this was  
21 ventilated at the hearing and you, yourself, said that season tickets are not  
22 included, and that it would therefore be, in the light of that, really not fair now  
23 without an actual amendment and further argument to now include season  
24 tickets.

25 **MR MOSER:** Sir, yes. I was dealing with that. What the defendants have produced  
26 is that half sentence from my exchange with you, sir, on Day 4, which one

1 sees in CMC bundle 1, tab 9, at page 489.

2 **MR JUSTICE ROTH:** CMC ...?

3 **MR MOSER:** Tab 9, page 489.

4 **MR JUSTICE ROTH:** Just one moment.

5 1, tab 9, page 489.

6 **MR MOSER:** Yes, at lines 9 to 12 -- or 9 to 11.

7 **MR JUSTICE ROTH:** Yes.

8 **MR MOSER:** What I was dealing with here was really something else; it was the  
9 question of the survey, you will recall --

10 **MR JUSTICE ROTH:** Yes.

11 **MR MOSER:** -- about commuters.

12 I say:

13 "The final point about commuters was -- you had the point -- commuters are not  
14 excluded, it's only commuting season tickets that are excluded, so asking  
15 commuters is not itself a flawed methodology."

16 It's verging on giving evidence for me to try and work out now what I might have  
17 meant by this. I might have been harking back to Mr Harris' attack on  
18 commuters, which was all about inbound commuters, and I was probably  
19 trying to address that question. I was not really addressing season tickets at  
20 all --

21 **MR JUSTICE ROTH:** Sorry, go on.

22 **MR MOSER:** I was going to say, I think it's the only mention of season tickets that  
23 has come in as an aside, and I respectfully --

24 **MR JUSTICE ROTH:** Sorry to interrupt you, is that quite right because you are  
25 harking back, as you say, to what I had said when this was raised by  
26 Mr Harris? And if you go back to page 466 in the transcript, this is Mr Harris'

1 submissions. Mr Harris was complaining and criticising Mr Holt's report for  
2 relying on the survey.

3 He said this survey is not very reliable as a basis -- not unreliable as a survey, but it's  
4 not a solid basis for the exercise Mr Holt is carrying out because the survey  
5 will capture a lot of commuters, and he said commuters are not in the claim.

6 I interrupted him at line 22, as you see:

7 "Just to clarify, when you say 'commuters aren't in the claim'. Commuting journeys  
8 aren't in the claim. A commuter with a Travelcard who takes another trip at  
9 the weekend is in the claim, I think."

10 He says:

11 "Yes, I stand corrected. That is a fair representation."

12 The point about commuting journeys there not being in the claim is to do with season  
13 tickets. That was the point. "Commuters" is sort of proxy for season ticket  
14 holders, but if they have a Travelcard and take a separate trip, which is  
15 outside, then it is in the claim. And Mr Harris says:

16 "Yes, I stand corrected. That is a fair representation."

17 That is, as I understand it, and understood it at the time, what you are picking up in  
18 the extract you have just taken us to, where you say:

19 "The final point about commuters was -- you had the point -- commuters are not  
20 excluded, it's only commuting season tickets ..."

21 So in rebutting the criticism of reliance on that report the point was being made, well,  
22 the criticism doesn't go that far because it's only the season tickets that are  
23 outside the claim. So that, I think, was the point I was seeking to make, which  
24 Mr Harris accepted, and you didn't, at that point, intervene to say: no, we have  
25 both misunderstood.

26 **MR MOSER:** Sir, no -- well, I certainly didn't intervene. My submission is that the

1 points made in the judgment is that the Tribunal heard almost nothing by way  
2 of submission, written or oral, from any of the parties about season tickets,  
3 apart from that side remark. And as far as submissions are concerned,  
4 I submit submissions are being made now.

5 Now, the other side say: oh no, but that's very unfair because of the rights of the  
6 defence. But I submit, whilst I can see some force in that submission, it's not  
7 in fact fatal for at least three reasons. The first is, my brief remark at the end  
8 of the last day after the witness evidence, after everybody else had spoken,  
9 and certainly well after the written cases had been prepared, cannot actually  
10 have influenced the defendants' litigation choices in any way.

11 The second point is, in fact they didn't ask Mr Holt a single question on all of the  
12 matters of great moment. So with great respect, it is not perhaps the  
13 strongest point now to suggest: well, they would have done so on season  
14 tickets in particular on this relative detail.

15 The third is, that whether we all referred to it, or saw it or not, it was in fact there  
16 plain to see, on the face of the evidence, and it was the draft judgment that  
17 alerted us to the fact that something had arisen here. If it had been a matter  
18 of real concern, the defendants could and should have raised it prominently --  
19 are they in or out -- yet they did not, well before my making a relatively  
20 throwaway remark at the end of the last day.

21 As I said --

22 **MR HOLMES:** Can I just pick up on that point? You say that this is a point of  
23 relative detail when referring to season tickets, you accepted a moment ago  
24 that you might accept a limit to season tickets where there is a Travelcard for  
25 the whole period of the season ticket; and I can see how that could take care  
26 of the temporal point, as it has been referred to.

1 But my question is this: you left out from this claim journeys into London, for the sake  
2 of simplicity, and I think we assumed, rightly or wrongly, that a big factor there  
3 would be the fact that many journeys into London would have concerned  
4 season tickets, and therefore perhaps that was a complication.

5 Now we are talking about season tickets on the going out of London. I wondered if  
6 you have any feel for how significant this point is. You referred to it as a point  
7 of detail.

8 **MR MOSER:** I don't have that feeling. I can say with great confidence that the  
9 season tickets were not the reason that we excluded journeys into London.  
10 Journeys into London raised completely different issues. They were excluded  
11 for a host of reasons, and it wasn't specifically or importantly season tickets.

12 **MR HOLMES:** Right.

13 **MR MOSER:** Quite how big this is, we don't know. It is self-evident that the value of  
14 the claim has been calculated without reference to season tickets because  
15 that is excluded from the current annex report. We wouldn't expect that value  
16 to increase exponentially on the basis of season tickets out of London,  
17 certainly not -- so that's why I call it a relative detail.

18 **MR HOLMES:** Yes, I ask the question because, whilst I appreciate this would be  
19 a matter of evidence and something which, if it's kept in, would be dealt with  
20 at trial, but once you've accepted a limit to situations where one has  
21 a Travelcard for the whole period of the season ticket, one does wonder how  
22 significant the point is.

23 **MR MOSER:** Well, yes, sir, the same applies, in a way, to return fares. One does  
24 wonder, but that's not a reason, we say, for excluding them wholesale at this  
25 stage of the proceedings.

26 **MR HOLMES:** Understood, yes. Thank you.

1 **MR MOSER:** I don't really have anything more to add, sir, unless there are further  
2 questions about the point. We do say that it requires few amendments. We  
3 would be happy with an amendment that said something like: and season  
4 tickets where a Travelcard is held for the whole duration of the season ticket.  
5 And we say that the further refinement of that ought better to await the stage  
6 after disclosure.

7 **MR JUSTICE ROTH:** Yes. Thank you.

8 **MR MOSER:** Thank you.

9 **MR JUSTICE ROTH:** Right. For the defendants, respondents, we hope you have  
10 coordinated as previously, and who is it who will take the lead on season  
11 tickets? Mr Harris.

12 You are muted, Mr Harris. We can't hear you. Yes -- no, you are re-muted. You are  
13 muted. Would you like to get some assistance if it's not unmuting?

14

15 **Submissions by MR HARRIS**

16 **MR HARRIS:** Sir, with many apologies. Paul Harris for London & South Eastern  
17 Railway. When we have a short adjournment, I will try to fix the other  
18 problem.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HARRIS:** Yes, we have divided up responsibility for this submission and I will go  
21 first. Mr Ward of course may wish to develop the particular examples that he  
22 gives in his Skeleton that we agree with, and if you like, adopt.

23 But in essence, there are two interlocking sets of problems here that you have  
24 identified. There is the fact that no methodology has ever been advanced to  
25 cope with this new and complicated addition to the case. So that is one set of  
26 problems.

1 But they interlock substantially with the other problems, which Mr Moser described  
2 as, if you like, rights of defence. It's because there has never been any  
3 methodology that we have never been able to examine whether, within  
4 evidence or in questioning, that methodology is apt; or to put it another way, it  
5 is credible and plausible; or that it has holes in it.

6 We are still not in that position today because Mr Moser, with great respect to him,  
7 has, if you like, on the hoof suggested that on a point that, with respect, can't  
8 have occurred to my learned friend's team before, that if there is an example  
9 where there is not a boundary fare available, then it might perhaps -- and he  
10 says now will be -- a paragraph you identified, I think it was 6.16.49.

11 So that those are the introductory comments. Those are two profound sets of  
12 problems that interlock, but just before I develop them briefly, can I remind,  
13 with great respect, the Tribunal -- and it seems Mr Moser -- that this was dealt  
14 with expressly in written submissions, at least by my client.

15 If you were to turn, please, in the bundle to tab 32, that's our Skeleton Argument for  
16 today in the hearing bundle, which is my volume 3 of the hearing bundle, and  
17 we identify at paragraph --

18 **MR JUSTICE ROTH:** Just one moment, this is volume --

19 **MR HARRIS:** -- we expressly made in writing in advance of the hearing the note  
20 that --

21 **PROFESSOR MASON:** I am sorry, Mr Harris, could you pause?

22 **MR JUSTICE ROTH:** Mr Harris, can you hear us?

23 **MR HARRIS:** -- and we cite there --

24 **MR JUSTICE ROTH:** Mr Harris, can you hear us?

25 **MR HARRIS:** -- (inaudible) --

26 **MR JUSTICE ROTH:** Mr Harris? No, you can't hear us. Mr Harris?

1 **MR HARRIS:** -- a reference, I take it, from the Skeleton for today so we --

2 **MR JUSTICE ROTH:** Mr Harris, you are not able to hear us (overspeaking) --

3 Mr Harris, pause. Pause. Can we perhaps send a message to Mr Harris that we  
4 can't -- Mark, can you send a message to him saying -- I think we should  
5 actually probably rise for five minutes to enable him, Mr Harris, to sort out the  
6 problem because we can now hear him but he cannot hear us. So we will just  
7 temporarily take five minutes.

8 **(10.12 am)**

9 **(A short break)**

10 **(10.22 am)**

11 **MR JUSTICE ROTH:** Yes, Mr Harris.

12 **MR HARRIS:** I am so sorry.

13 **MR JUSTICE ROTH:** No, don't worry. These things happen.

14 **MR HARRIS:** I had just been stating that there are two interlocking sets of issues,  
15 and I was setting the ground work to develop them briefly by referring you to  
16 our Skeleton Argument, as summarised in paragraph 14 of the Skeleton  
17 Argument for today's hearing. As you can see, from paragraph 14 of the  
18 Skeleton Argument for today's hearing, which is found in my hard copy at  
19 tab 32 of volume 3 of the bundle for today --

20 **MR JUSTICE ROTH:** Yes.

21 **MR HARRIS:** -- you will see that in the third line, we cite what was footnote 53 of  
22 our CPO Skeleton -- one does not need to turn up that Skeleton because it's  
23 cited here, but we say in very clear terms:

24 "In-bound journeys to London are excluded, as are season ticket journeys."

25 So it couldn't have been clearer what our understanding was in advance of the  
26 hearing. And it didn't end there because, as cited at (ii) at paragraph 14 of

1 today's Skeleton, we say:

2 "However, usage of the Key [that's a particular smart card, you may recall] is very  
3 limited: It is predominantly used for season tickets (which constitute  
4 out-of-scope journeys that are, accordingly, irrelevant)."

5 So our very clear understanding on the basis of Mr Holt's report, in advance of the  
6 CPO hearing beginning, was that these season ticket journeys were wholly  
7 outside the scope of the claim.

8 And indeed that understanding was, plainly, shared, with great respect, by the  
9 Tribunal because -- again, one does not need to turn it up --

10 **MR JUSTICE ROTH:** No, that's right --

11 **MR HARRIS:** -- and that's paragraph 187 of the judgment from the Tribunal.

12 Just to go back for a moment to the paragraph that Mr Moser cited, seemingly in  
13 support of his own argument, although I found that difficult to understand, at  
14 6.2.16, so this is -- if one wanted to turn it up, it's tab 15 of the same bundle  
15 for today, and it's page 746 of the bundle numbering. It's 6.2.16 of Mr Holt's  
16 first report. He says in the first line:

17 "I include ... but [and the critical word is] exclude those relating to season fares."

18 So unsurprisingly, we took the view that they were excluded because that's what  
19 Mr Holt said. Then Mr Moser sought somehow to pray in aid the final  
20 sentence as somehow the opposite of those words, that season tickets are  
21 excluded -- or it wasn't clear to me quite how the point was put, but it doesn't  
22 assist him because the final sentence says, simply:

23 "Therefore, excluding season fares ..."

24 Well, again, direct reconfirmation of the fact they are excluded, and then he gives  
25 a reason -- or then he makes a comment about that exclusion. He says it's  
26 a conservative assumption. Well, with great respect, so what? We don't care

1 whether it's a conservative assumption or a radical assumption. The fact is  
2 it's excluded. And for what it's worth, of course, it's quite common to see in  
3 experts' reports as they are building up a complicated multi-layer methodology  
4 that certain things are excluded, whether on the basis of conservative or other  
5 assumptions. Sometimes there are conservative assumptions and then they  
6 are said to be outweighed in the balance or overall, it's all fair enough  
7 because some are more radical.

8 It does not really matter. The fact is they were excluded. You understood that; we  
9 understood that. We put that in writing before the hearing began, and  
10 therefore the entire hearing proceeded on the basis that they were excluded.  
11 As indeed, as you pointed out to him, sir, Mr Moser expressly accepted in that  
12 interchange from the transcript that we just looked at.

13 So against that background, that takes care entirely of Mr Moser's first three reasons  
14 why this is not fatal. His first reason was: well, I made that remark at the end  
15 of the hearing. Yes, he did make it at the end of the hearing, but it had been  
16 preceded by Mr Holt's report excluding them and by our written double  
17 acknowledgment that they were excluded.

18 Then, that takes me on to his second supposed reasons that they are not fatal. He  
19 said: well, you didn't ask Mr Holt. Of course we didn't ask Mr Holt, we didn't  
20 need to. Mr Holt said they were excluded.

21 **MR JUSTICE ROTH:** Yes, thank you, Mr Harris. I think we will just take a moment.

22 I am sorry to make you pause, but it may be helpful. We will just withdraw for  
23 a moment.

24 **(Pause)**

25  
26 **Decision by THE TRIBUNAL**

1 **MR JUSTICE ROTH:** Mr Moser, we have considered, we've thought about it  
2 obviously in advance. We think the reality of the situation is that while they  
3 were technically perhaps in the class, as defined in the application, everyone  
4 does seem to have proceeded on the assumption at the hearing that season  
5 tickets were not included. It's not a question of people relying on what you  
6 said on Day 4, as you point out. That was after the evidence, but that simply  
7 illustrated the assumption on which people were working.

8 Mr Harris has drawn attention to what LSER said and you know how the Tribunal  
9 understood things; and secondly, as you acknowledged, we have not got an  
10 articulated methodology for addressing season tickets. You have made what  
11 seems to us quite a significant concession, that it will only be where the  
12 Travelcard is for the whole duration of the season ticket, and that just  
13 illustrates the fact that this does require quite careful thought.

14 So we are not satisfied that we really have a thought-through method for dealing with  
15 that, now on the rather more limited basis that you have now put it, which  
16 certainly wasn't put before. So our view is that they should be excluded from  
17 the class and the definition should be made clear that they are excluded.  
18 That does not of course preclude the possibility of your applying to amend the  
19 class definition, which is provided for under the rules, I think, at rule 85, but  
20 that would have to be by an application supported by exactly how you say it  
21 should be amended.

22 You have sketched that out in what you said this morning, I think, for the first time. It  
23 will be an opportunity then for the defendants, if they wish, to put in any  
24 evidence on that. We could, if necessary, hear that at the same time if you do  
25 make such an application, and obviously we'll need to consider that with those  
26 instructing you and Mr Gutmann, at the same time as your application to

1 amend the claims to bring in additional defendants, which was only taken out  
2 recently.

3 As you know, we are not going to deal with it today. As we understand it, it is not  
4 agreed by anyone. If it is agreed, of course we don't need to hear. But if it's  
5 not agreed, then we should fix a date when you can argue that application to  
6 amend the claim form, and if you want to seek to amend the class definition to  
7 bring in season tickets under certain qualifications, it can be done at the same  
8 time. But for today in settling the class definition, we will exclude them.

9 **MR MOSER:** I am most grateful. Essentially, we felt constrained to raise the issue  
10 when we saw the draft judgment and we realised what the expert's report  
11 said.

12 **MR JUSTICE ROTH:** Yes.

13 **MR MOSER:** In the short adjournment, we had debated suggesting that very thing.

14 **MR JUSTICE ROTH:** Yes.

15 **MR MOSER:** So, sir, thank you for that.

16 I see, sir, that Mr Ward has his hand up.

17 **MR JUSTICE ROTH:** Right. Yes, Mr Ward.

18 **MR WARD:** Thank you, sir. I just wanted to say in the interests of good order that  
19 somewhere in our amended response we have a footnote that says it's  
20 unclear what the position was with regard to season tickets, although I think  
21 somewhere else we said we thought they were excluded. In my respectful  
22 submission, this make no difference at all to the observations you have just  
23 made, but I just wanted to ensure that was in the Tribunal's mind.

24 **MR JUSTICE ROTH:** Thank you very much.

25 With that, can we turn to the class definition which we've got in the Draft Order?

26 **MR MOSER:** Yes.

1 **MR JUSTICE ROTH:** Which is in my bundle 2 at page 918. This is tab 25. It's at  
2 paragraph 5. It of course is then reflected in the notice.

3 **MR MOSER:** Yes.

4 **MR JUSTICE ROTH:** "All persons who at any point during the period between  
5 1 October 2015 and [we'll hear about the period] purchased or paid for --"  
6 I think it's clearer if one puts the word "a rail fare" after "paid for":  
7 "... purchased or paid for a rail fare for themselves and/or another person, which was  
8 not [so just moving up the words 'rail fare'] a season ticket or a boundary fare  
9 or --"

10 And I don't think we need the words "point-to-point", which is a word we all now  
11 understand, but it's not commonly used by the public:  
12 "... or a fare for the portion of their journey --"

13 And we think it should be "from" not "between":  
14 "... from the last station covered by their Travelcard to their destination."

15 **MR MOSER:** Sir, yes, that seems to us all fine.

16 As for the period --

17 **MR JUSTICE ROTH:** Yes.

18 **MR MOSER:** The two square brackets are simply for the two separate sets of  
19 defendants. The date of final judgment or earlier settlement of the claims is  
20 for First MTR and LSER -- no, sorry, it's for --

21 **MR JUSTICE ROTH:** First MTR and Stagecoach --

22 **MR MOSER:** And Stagecoach, sorry.

23 **MR JUSTICE ROTH:** And LSER because that's the date they ceased to operate the  
24 franchise.

25 **MR MOSER:** Then 2 am is for South Eastern, yes?

26 **MR JUSTICE ROTH:** Yes. Well, that seems to us the right -- unless any of the

1 defendants wish to dissent.

2 **MR HARRIS:** No, sir, but I do have a comment on the timing of any application  
3 when you are ready to hear that.

4 **MR JUSTICE ROTH:** Of any application to amend the class definition or the --

5 **MR HARRIS:** Yes.

6 **MR JUSTICE ROTH:** Well, as far as that's concerned, the members of the Tribunal  
7 have various constraints -- in my case because of other hearings and my  
8 colleagues, for other commitments -- as to when we could hear this. And  
9 clearly, there are applications to amend. They are not, by common  
10 understanding, to be heard today and they do raise issues that will have to be  
11 ventilated.

12 Can I have some indication as to -- just dealing with the amendment of defendants --  
13 additional defendants' point -- how long a hearing do you think is required?

14 Ms Abram.

15  
16 **Submissions by MS ABRAM**

17 **MS ABRAM:** Sir, we would ask for those applications to be considered on paper, if  
18 at all possible. As you know, sir, we are particularly concerned to limit the  
19 costs of these proceedings to the extent possible. I think Mr Moser has  
20 suggested those applications could be dealt with on paper, and we  
21 respectfully agree with him about that.

22 Insofar as the question -- while I am speaking -- of how long we need to respond is  
23 concerned, Mr Moser has suggested that we should respond within a week  
24 from today, which is by 25 November. That is too soon. We can't do it by  
25 then, and we ask for, effectively, two weeks extra, to 10 December, which we  
26 think is a reasonable period and we can't see that would cause any prejudice

1 to anyone.

2 **MR JUSTICE ROTH:** Yes. Are you speaking on behalf of all defendants? Mr Harris  
3 is shaking his head. You are not. Right.

4 Mr Ward.

5

6 **Submissions by MR WARD**

7 **MR WARD:** Thank you, sir. We would be content with until 10 December to  
8 respond. The only point I wanted to reserve our position on was the question  
9 of whether an oral hearing would be needed at all.

10 **MR JUSTICE ROTH:** It would be helpful to decide that today because if an oral  
11 hearing is needed, there are a lot of parties --

12 **MR WARD:** Yes.

13 **MR JUSTICE ROTH:** -- you are all heavily committed and so are the Tribunal  
14 members --

15 **MR WARD:** Yes, I do appreciate that, sir. It's just complicated. We have a joint  
16 venture here between two companies, First Group and MTR.

17 **MR JUSTICE ROTH:** Yes, we appreciate that.

18 **MR WARD:** There's even a possibility that someone will need to be separately  
19 instructed. I am only acting for First MTR, the joint venture.

20 **MR JUSTICE ROTH:** I see.

21 **MR WARD:** The application was only made on 11 November, so I am bound to, if  
22 I may say, feel the way forward rather cautiously.

23 **MR JUSTICE ROTH:** No, I understand. Can I cut it short? If we need a hearing, it's  
24 our view that one day is sufficient. It should not be a matter that needs more  
25 than a day. Despite the number of parties, the actual issues to be argued are  
26 limited.

1 **MR WARD:** The issue that will be at stake, essentially, is whether the parent  
2 companies are part of the same undertaking and whether to at least allow an  
3 amendment that makes that allegation.

4 **MR JUSTICE ROTH:** Yes.

5 **MR WARD:** So it may well be that a day is sufficient. Obviously, it's a second order  
6 question what the outcome of that issue would be were it to go to trial.

7 **MR JUSTICE ROTH:** Oh, yes.

8 **MR WARD:** But again -- forgive me for expressing myself rather cautiously, as  
9 I simply don't know where we will end up with that.

10 **MR JUSTICE ROTH:** I think we will say it will not take more than a day.

11 **MR WARD:** Very well.

12 **MR JUSTICE ROTH:** And what I suggest we do is we hold a day in reserve, so we  
13 have a day and if everyone agrees, it can be heard on paper, all well and  
14 good. If some say it needs an oral hearing and others disagree, we will have  
15 to take a view. If, on reflection, you all think it needs a hearing, we have  
16 a day. But that day will not be until January because we have no availability  
17 until January, and so on that basis, 10 December for responses does seem to  
18 us causing no delay.

19 Mr Harris.

20

21 **Submissions by MR HARRIS**

22 **MR HARRIS:** Thank you so much. Taking the issues in order, one day is sufficient,  
23 in our respectful submission. In our submission, a paper application is also  
24 acceptable, but we are obviously prepared to live with putting a date in the  
25 diary, and if it turns out to be needed, so be it, and that that date be in  
26 January.

1 Thirdly, our position is that we would like until 10 December to decide on the issue of  
2 principle whether we oppose the application to make an amendment or not,  
3 but that if we --

4 **MR JUSTICE ROTH:** You are in -- can I just remind myself, your client is not a joint  
5 venture; is that right?

6 **MR HARRIS:** The operating company -- I will stand corrected from those instructing  
7 me -- is not a joint venture.

8 **MR JUSTICE ROTH:** Yes, so it's slightly different from the other two defendants,  
9 yes.

10 **MR HARRIS:** Sorry, I am corrected, it is a joint venture, the operating company  
11 that's the named defendant.

12 **MR JUSTICE ROTH:** Right. Someone is not. One is 100 per cent owned --

13 **MS ABRAM:** That's me.

14 **MR JUSTICE ROTH:** Yes, I got confused.

15 **MR HARRIS:** Sorry, and I apologise to my own client. But the reason -- the timing  
16 point is this, that we are happy to confirm one way or the other in substance  
17 by 10 December whether we agree to the application to amend, obviously not  
18 to the substantive outcome at trial, but the application to amend or not by  
19 10 December. But that if by 10 December we do substantively oppose, we  
20 would like until the end of term in order to put in the paperwork relating to the  
21 written opposition. And that is for a number of reasons, including other  
22 commitments, but also because, as you will appreciate, my client is now no  
23 longer the operator and there are complications by the fact that many  
24 employees have transferred across to the operator of last resort. It just adds  
25 time -- and that's on top of the points that Mr Ward has adverted to, regarding  
26 the fact there needs to be liaison with the parents as well.

1 But given that the Tribunal has indicated this won't be decided until January, even if  
2 there is to be an oral hearing, then having until the end of term in order to put  
3 in the paper work in opposition if we do, ought to cause no prejudice.

4 **MR JUSTICE ROTH:** Well, it may not be -- it might be decided earlier if it's on  
5 paper.

6 **MR HARRIS:** Yes.

7 **MR JUSTICE ROTH:** I am just a bit concerned that you say you need until  
8 10 December just to decide whether you agree. That seems quite a long  
9 time.

10 **MR HARRIS:** That's correct, sir, although you will appreciate we've had minimal  
11 notice of this and there are other complications about the transfer and the fact  
12 there are multiple parents; they have different shareholdings in different  
13 positions and they are facing different -- I mean, there are all kinds of things  
14 going on and that's why we say there could be a decision in principle relatively  
15 soon. I mean, that's only a few weeks away, on an important issue of  
16 principle. And the advantage of giving us the time, if I may respectfully put it,  
17 to decide in principle is it increases the chance of there being mature  
18 reflection, and therefore potentially no opposition, and then that's in  
19 everybody's interests.

20 **MR JUSTICE ROTH:** No, I see that.

21 **MR HARRIS:** Those are the points about the parent companies application, but at  
22 the appropriate moment, which is now if you allow me, the application to  
23 amend on season tickets, that's a different beast. We think that that would  
24 have to be heard at an oral hearing, and that one does cause me more  
25 problems because that one, as we have already heard in today's hearing  
26 alone, gives rise to some complicated factual questions about how season

1 tickets work, where they work, what the temporal implications are, what the  
2 conceptual implications and let alone the methodology. In my case in  
3 particular, I need to be able to have access to detailed operating personnel,  
4 who have now transferred away from my client.

5 And so for all of those reasons, my respectful submission is that if the two  
6 applications are to be determined at the same time and at an oral hearing,  
7 then January is problematic.

8 Of course if they are split, it's less problematic, provided there's more time for the  
9 season ticket application, if one is ever made. And if the parent company  
10 application is to be decided on the papers, again at a different time, then  
11 there's less of a problem.

12 But my basic point is my client, with respect, needs more time for any season ticket  
13 application. And of course there isn't even a season ticket application yet  
14 made.

15 **MR JUSTICE ROTH:** Well, there may or may not be, we don't know. Well, the date  
16 that we had in mind at the moment is Monday, 31 January. So it's January,  
17 but it's the very end of January for an oral hearing.

18 Now, you will need to check your diaries, but anything before then is difficult. If it  
19 can't be the 31st, then we are not available on the 1st, but we can look at the  
20 position later that week, which is the first week in February. So, I think that  
21 should give, it seems to me -- it must give sufficient time for people to get  
22 instructions and any evidence they wanted on season tickets -- provided,  
23 Mr Moser, that you decide whether you are going to apply fairly soon.

24 I think as far as the amendments are concerned, Mr Moser, two defendants say  
25 10 December; Mr Harris is asking for longer, for reasons he has explained  
26 and his client is now in a rather different position, and the consensus is that

1 we will keep a day for oral argument if necessary, but it may well be done on  
2 paper.

3 Would you like to address that first?  
4

5 **Submissions by MR MOSER**

6 **MR MOSER:** Yes. I am going to try and stick to the consensus as much as I can  
7 now that there is an outbreak of agreement. I agree with, I think, everything  
8 that my learned friends, Ms Abram and Mr Ward, said and I agree with a  
9 certain amount of what Mr Harris said, until it got to the extra time and our  
10 application.

11 We are perfectly in agreement that, if possible, the application for the parent  
12 company joinder should be done on paper. If it can't be done on paper, we  
13 also agree it ought not to take longer than a day. I think in our Draft Order we  
14 had very hopefully put half a day, but I can quite see, especially since it's now  
15 quarter to 11 on this relatively straightforward point, that half a day may not be  
16 enough.

17 The question of timing, I don't particularly want to have an outbreak of  
18 non-consensual argument, but we did write in August about potentially joining  
19 the parent companies, so it's not a complete surprise and we made the  
20 application a week ago. Today is, I think, 18 November. So it ought to be  
21 possible, with the greatest respect, even with the constraints which we accept  
22 Mr Harris mentions, that something can be decided in principle before  
23 10 December, so that anything that comes back on 10 December is already  
24 fully formed, as it were.

25 I don't make that point too strongly. It's in the Tribunal's hands, but we would have  
26 thought 10 December ample time for all defendants. And indeed as the

1 defendants were keen to point out, and indeed I was specifically asked to say,  
2 that contrary to what we thought and said in our PCR Skeleton and our  
3 applications, they do not in principle object to the applications, they just have  
4 not told us yet whether they consent.

5 That is something they were very keen to point out and I am very happy to convey  
6 the correction that they do not in principle object to these applications. Sir,  
7 that is there. Of course if they agree, none of this is going to matter.

8 **MR JUSTICE ROTH:** Yes.

9 **MR MOSER:** We don't want to put obstacles in the way of Mr Harris' clients  
10 agreeing. So, that is, I think, all I can say about those points.

11 **MR JUSTICE ROTH:** Now, as regards the potential application for season tickets,  
12 by when is it fair to say you can decide your position and either make the  
13 application or not? That could also be 10 December, could it not?

14 **MR MOSER:** Yes, sir, it could.

15 **MR JUSTICE ROTH:** Yes. Right. Then there will be a question -- and that would  
16 be any application with any supporting evidence, and then there would need  
17 to be time for a response, which would be some time in the early part of  
18 January.

19 **MR MOSER:** Of course we, sir, would also need to be able to respond to whatever  
20 the train companies put in, in relation to the parent companies, if they put in  
21 something of substance.

22 **MR JUSTICE ROTH:** Yes. We'll just take a moment and return to you. It won't take  
23 us long.

24 Mr Harris, you want to say something, and Ms Abram wants to say something.

25 Yes, Mr Harris first.

26

1 **Submissions by MR HARRIS**

2 **MR HARRIS:** I am grateful. Thank you, sir.

3 I have had specific instructions that we would not be able to respond, given what my  
4 instructing solicitors know regarding the state of play and the personnel  
5 involved in early January, bearing in mind that this application, if it's made, will  
6 have to include economic evidence as well and some sort of detailed  
7 methodology. So it's not just the problem with the underlying lay clients and  
8 their transfer, but it's on top of that that it will be economic evidence, so  
9 therefore we'll have to -- even if we don't put in an economic report in  
10 response, we'll have to take economic advice. And then of course there's the  
11 Christmas break --

12 **MR JUSTICE ROTH:** Yes.

13 **MR HARRIS:** -- so they have very seriously -- and we understood the remark you  
14 made, sir, regarding the desirability of having this done end of January or  
15 February, but my specific instructions are we cannot make that date.

16 **MR JUSTICE ROTH:** Well -- Ms Abram next.

17  
18 **Submissions by MS ABRAM**

19 **MS ABRAM:** Thank you.

20 There's also the question, sir, of the interaction between this point, the timing of the  
21 season ticket aspect, and the application for a stay that's before the Tribunal.  
22 I do absolutely see that the parent company issue is kind of *sui generis*, and  
23 so regardless of whether there is to be a stay of the proceedings, as we say  
24 there should be, pending appeals, there's an importance in pressing ahead  
25 with determining that issue. But the season tickets issue is part of the rump of  
26 the litigation, and so if there is to be a stay pending appeals, then we would

1 say it would make sense for the season tickets applications not to be heard  
2 until after the appeals have been determined. So we just wouldn't want to  
3 pre-judge the stay application in respect of setting down a timetable now on  
4 this aspect.

5 **MR JUSTICE ROTH:** Well, we can think about that. I think there is -- the season  
6 ticket deals with the class definition and it may be better to have that resolved  
7 before this case goes any further, if it does go further, on appeal. So that  
8 somebody may wish to challenge the season ticket outcome, and the last  
9 thing we want is one potential appeal and another potential appeal, so it  
10 should all go together.

11 I think we will just consider because we need to move on to other matters. **(Pause)**

12  
13 **Decision by THE TRIBUNAL**

14 **MR JUSTICE ROTH:** Thank you for that. I will say that on the amendment  
15 application for First MTR and Stagecoach to respond by 10 December, for  
16 LSER we are sympathetic to their particular difficulties at the moment, but we  
17 nonetheless think they can indicate by 6 December whether they are going to  
18 oppose it or not. We think that is ample time to get instructions and we will  
19 give them an extra week if they do oppose it to put in their grounds of  
20 opposition. That's 17 December; any reply by the claimant by 14 January.

21 In the responses if they are being opposed, the defendants should indicate whether  
22 they are content for the matter to be dealt with on the papers. We shall  
23 reserve a day to be fixed in either late January or early February, and that is  
24 to be discussed separately out of this hearing to fix a date, and then we will  
25 direct Skeletons once we have a date, but we won't spend time trying to work  
26 out dates now.

1 As regards the question of season tickets, the claimant, if it wishes to amend the  
2 class definition, must put in its application with any supporting material by  
3 10 December, responses from the defendants by 21 January, which we think  
4 gives ample time.

5 **MR HARRIS:** Sir, may we have also just a provision of liberty to apply on the day --  
6 we've heard you loud and clear --

7 **MR JUSTICE ROTH:** Yes, there's always liberty to apply, but it has to be with good  
8 reason.

9 Right, I think the next thing is the question of appeals.

10 **MR WARD:** Sir, may I just make one point -- forgive me talking over you. I had my  
11 hand up and didn't want to come back. It's probably only stating the obvious  
12 that, at the moment the pleading, the amended pleading from the claimant  
13 does involve various points made about season tickets. So we take the view  
14 that, as things stand, those pleadings are in a sense not permitted and we  
15 would not be required to plead to them, because of course the Tribunal has  
16 not presently allowed that aspect of the claim. And it's for Mr Moser in effect  
17 to decide whether to revive those aspects of the claim, having given  
18 consideration to the Tribunal's observations today.

19 **MR JUSTICE ROTH:** That seems correct, does it not, Mr Moser?

20 **MR MOSER:** Indeed, that must be correct.

21 **MR WARD:** There's just one other point, if I may, which is under the heading of  
22 "liberty to apply". As have I made the point already, is it possible that the  
23 parent companies in my case will be separately represented and therefore it is  
24 possible they will need to ask the Tribunal for extra time. I am not trying to  
25 invite the Tribunal to decide that today.

26 **MR JUSTICE ROTH:** No. Well, liberty to apply -- we can put in the order liberty to

1 apply, including by the proposed new defendants.

2 **MR WARD:** Thank you.

3 **MR JUSTICE ROTH:** Permission to appeal. We have read of course the very full  
4 and thorough submissions on applications for permission to appeal. As you  
5 know, in most cases the Tribunal decides permission to appeal on the papers.  
6 We have not said that we are going to do that on this matter, but we have  
7 come to a provisional view. We've had regard to all that is said, but we do not  
8 think it's appropriate to grant permission to appeal. In particular -- I won't go  
9 through all the various grounds because if that is our firm decision, there will  
10 be a written ruling on it -- I just indicate that on what is one of the main  
11 grounds, namely sort of commonality, suitability, we consider that this matter  
12 has been decided, in particular by the Court of Appeal in *Merricks* and the  
13 recent unanimous decision of the Supreme Court in *Google*, which states the  
14 position on causation as being that set out in the judgment of Lords Leggatt  
15 and Sales in *Merricks* in the Supreme Court, and that now has effectively the  
16 approval of the full Supreme Court in the *Google* case, and then we were not  
17 persuaded on the various other grounds put forward.

18 So that's our provisional view. If you want to address oral argument, we are not  
19 going to shut you out. We'd only say it won't help us if you, as it were, repeat  
20 the points that you have made very fully in writing and which we have  
21 considered.

22 Do any of the defendants want to address us further on permission to appeal?

23 Ms Abram.

24  
25 **Submissions by MS ABRAM**

26 **MS ABRAM:** May I make two points that I have not made in writing, including one in

1 response to what the Tribunal has just indicated? The first, on the substance,  
2 goes to a point that was developed by Mr Ward in respect of the cost benefit  
3 aspect of the judgment.

4 **MR JUSTICE ROTH:** Yes.

5 **MS ABRAM:** Now, since we put in our applications for permission to appeal, a point  
6 that has been of very great concern to my clients in particular is that we have  
7 learnt what the PCR's costs of the CPO hearing stage were, and it's become  
8 evident -- and this point is relevant to costs as well as permission to appeal --  
9 that there has been a massive overrun of costs, as compared to the costs  
10 budget that was before the Tribunal back in March. And in fact that there  
11 must already have been an extremely substantial costs overrun by the time  
12 the Tribunal considered that cost budget, and relied on that cost budget at the  
13 CPO hearing in March.

14 Now, if I'd known the full extent of the costs that had been incurred by the PCR, and  
15 that the PCR was going to want to claim, I would have wanted to make  
16 submissions on the updated costs position when I was addressing the costs  
17 and benefits of making the CPO that was requested in this case.

18 **MR JUSTICE ROTH:** Yes.

19 **MS ABRAM:** And so for that reason, I make two subsidiary points as to the practice.  
20 The first is that I respectfully endorse and echo Mr Ward's application for  
21 permission to appeal in respect of costs and benefits; and second, in terms of  
22 a practical way forward, I ask the Tribunal, whether under the head of this  
23 CMC or another head, to direct the PCR to submit a revised and updated  
24 costs budget so that we can see what the true current position is. It may be --  
25 and I ask for that, although we have their statement of costs because their  
26 statement of costs only relates to the costs they are actually claiming against

1 us. There may be other overruns under other heads either incurred or  
2 expected that we don't yet know about, and that's relevant to appeals, but  
3 also to other applications that my clients might want to make if this case does  
4 go forward, for instance, for costs management --

5 **MR JUSTICE ROTH:** Yes. Thank you.

6 **MS ABRAM:** -- I am grateful. That's my first point.

7 My second point is that if the Tribunal were inclined to refuse permission to appeal in  
8 these proceedings with written reasons to follow, I would respectfully ask that  
9 time for us to renew our application for permission to appeal to the Court of  
10 Appeal should run from the date of delivery of the written reasons of the  
11 Tribunal, instead of from today's date, which I think would be the default  
12 position under PD52(d), because we need to see the reasons in full before we  
13 can address them in our Skeleton Arguments. You know we only have 14  
14 days --

15 **MR JUSTICE ROTH:** Yes, that seems, on that second point -- I have not obviously  
16 spoken to my colleagues, but that seems entirely fair.

17 **MS ABRAM:** I am grateful.

18 **MR JUSTICE ROTH:** Mr Harris.

19  
20 **Submissions by MR HARRIS**

21 **MR HARRIS:** Yes, sir, I have just a discrete point. I don't wish to address you on  
22 the substance of permission to appeal, but you will have seen that there has  
23 been a consensus amongst the proposed appellants and proposed  
24 respondents that there is jurisdiction to appeal --

25 **MR JUSTICE ROTH:** Yes, and I am sorry I meant to say that. We are persuaded  
26 that there is jurisdiction and that the proper interpretation of the Court of

1 Appeal judgment in *Merricks* is that just as there is jurisdiction for the  
2 proposed class representative to appeal, where the decision has turned not  
3 on authorisation, but on certification of the claims, that there is jurisdiction.  
4 Thank you for pointing that out.

5 **MR HARRIS:** I am most grateful. And we would be particularly grateful if there  
6 could be a short paragraph in the written reasons to that effect. There's  
7 a practical reason for that because with such a paragraph, we perhaps would  
8 not find the need to put in a protective application for judicial review with extra  
9 costs and expense, and that seems so unnecessary.

10 **MR JUSTICE ROTH:** Yes. I think that would be -- I agree that would be a waste  
11 and if in what I would regard as quite surprising circumstances, the Court of  
12 Appeal were to take a different view, one would hope your time to put in  
13 a judicial review application would be extended, otherwise that would be quite  
14 unfair.

15 **MR HARRIS:** Thank you, sir.

16 **MR JUSTICE ROTH:** Yes. Mr Ward.

17 **MR WARD:** Nothing to add, sir, thank you.

18 **MR JUSTICE ROTH:** Yes. Well, we will give a written ruling. We will try and  
19 produce it very quickly, but we will, in any event, direct that the time for  
20 renewal of an application before the Court of Appeal should be from the date  
21 of the written ruling and not from today. For reasons to be set out that in  
22 ruling, we will refuse permission to appeal.

23 The next question is stay. In the light of that, we think it is agreed and seems to us  
24 to make sense that there won't be a notice published, and people won't be  
25 provided with an opt in/opt-out date before the question of permission to  
26 appeal, and if it's granted, an appeal is determined, because that would only

1 cause immense confusion amongst the class and costs to everybody else.

2 We do think it's sensible, however, to nonetheless finalise the dates that could be in  
3 the notice, so one does not have to have another hearing and we would have  
4 thought that it should be for three months after either an appeal -- either the  
5 permission application is determined refusing the applications for permission  
6 to appeal or if permission is granted, three months after the appeal is finally  
7 determined and the notice not to be sent out until either of those two events,  
8 whichever is the later.

9 I have not expressed that, perhaps, very elegantly, but to rephrase it: the notice will  
10 not go out until after either permission to appeal is refused by the Court of  
11 Appeal, or if it is granted, after the appeal is determined; and that when it  
12 does go out, the date on which people are directed to either opt-out or  
13 non-domiciled persons opt in will be three months after the date when the  
14 notice is sent out.

15 **MR WARD:** Sir, that implicitly assumes of course that we are unsuccessful in our  
16 appeal. If we are successful, of course, all of that will be potentially --

17 **MR JUSTICE ROTH:** Well, the orders will be set aside if you are successful. That  
18 follows.

19 **MR WARD:** Thank you.

20 **MR JUSTICE ROTH:** Then obviously, there is then no CPO because it's quashed.

21 The next question is whether there should be a further stay, as sought, with regard to  
22 defences and indeed pleadings, other than the sending out of a notice, and  
23 that is asked for, I think, by all the defendants for reasons that they have  
24 explained.

25 I think perhaps it's sensible to hear from you first, Mr Moser.  
26

1 **Submissions by MR MOSER**

2 **MR MOSER:** Sir, yes. There is not a great deal to say about this. Our Draft Order  
3 at paragraph 24, which is at page 922 of, in my case, the second CMC  
4 bundle, tab 25. 922 proposes a stay, but only for essentially the  
5 advertisement, and that's paragraphs 9, 10 --

6 **MR JUSTICE ROTH:** Yes, you want pleadings to proceed --

7 **MR MOSER:** We want proceedings to proceed. The approach that we are urging  
8 on the Tribunal is the one that was taken by the Tribunal in *Le Patourel v BT*.  
9 We submit with great respect, that's a sensible approach to take. We need  
10 the matter to get on. There has been of course a delay in this case because it  
11 had to stand behind *Merricks*. It may not be quite the same as a situation  
12 where many people are aged and dying. However, there are evidential issues  
13 that were explored at the hearing, and the Tribunal was concerned that it must  
14 be possible, potentially, to retrieve certain records. And it was the defendants  
15 who made the point that these things are all going to be very long ago, and if  
16 everything is stayed would it be even longer ago.

17 This is a case where the defendants have had our pleading for two years. The  
18 changes made in the amended version are of the most vanilla variety  
19 imaginable. They are not of substance, they are just tidying things up. So  
20 they must know what they are going to say in response. We simply say that  
21 the Tribunal should order that we get on with it.

22 **MR JUSTICE ROTH:** Yes.

23 **MR MOSER:** There isn't really very much more because we, with respect, consider  
24 that this is such an obviously preferable way, every case being put on the  
25 backburner and awaiting what may or may not happen in the appeals.

26 **MR JUSTICE ROTH:** Of course you accept then the cost risk if the appeals should

1 be successful?

2 **MR MOSER:** There is that, sir, but implicitly we do. And if they have not yet done  
3 so, I would say it would be surprising if the defendants had not yet prepared  
4 what they think about our pleadings.

5 **MR JUSTICE ROTH:** Right.

6 **MR MOSER:** As we say they've had years and it's been rehearsed at length in the  
7 hearing, and so forth.

8 **MR JUSTICE ROTH:** Yes. Right, who is leading for the defendants?  
9

10 **Submissions by MR WARD**

11 **MR WARD:** I will, if I may, sir. We do submit the appropriate course is for there to  
12 be a general stay, pending determination by the Court of Appeal of the  
13 application for permission to appeal. It is, as the Tribunal knows, obvious that  
14 this case has cost an enormous amount of money so far. Mr Moser's claim  
15 for the costs, even within the window to which he's restricted himself, is  
16 almost £2 million.

17 It is, obviously, also the case that any further endeavour now is potentially entirely  
18 wasted if the Court of Appeal does indeed take a different view, or even if the  
19 view is, if you like, in some sense qualified; in other words, it does not give the  
20 appellants an outright win, but nevertheless takes a somewhat different  
21 position to the Tribunal.

22 Of course it isn't right that, speaking at least for my part, that my clients have been  
23 busily engaged working out their answers to the substance of this case. They  
24 have been contesting the application for certification, and that enough has  
25 cost very considerable amounts of both time and money.

26 So in our respectful submission, the appropriate course is to grant a stay for now. Of

1 course as to the documents, everyone involved in this case is under  
2 document retention obligations and Mr Moser is not arguing that witnesses of  
3 fact are going to lose their recollection. Indeed, on his side, he is not  
4 proposing to call any witnesses of fact at all. There will be no ticket  
5 purchasers or anything of the kind. Although it's right he will indeed be on  
6 cost risk, it is also a question of the huge diversion of effort and attention that  
7 this would require.

8 It's not clear to me whether his submission is that the stay should apply other than  
9 for the perfection of the pleadings, but even that will be a very substantial  
10 endeavour for all concerned.

11 **MR JUSTICE ROTH:** I did understand him to say there should be pleadings, but not  
12 disclosure.

13 **MR WARD:** I hope that is what he was saying. It sounded a little broader this  
14 morning. But even that step of pleadings is very substantial and potentially  
15 entirely wasted, if indeed the appeal prevails.

16 **MR JUSTICE ROTH:** Yes. Are you speaking for all the defendants?

17 **MR WARD:** I am certainly speaking first, but I would not presume to have made all  
18 of their points.

19 **MR JUSTICE ROTH:** Right.

20 Next, Ms Abram.

21  
22 **Submissions by MS ABRAM**

23 **MS ABRAM:** Thank you, sir.

24 May I just make a point on practicalities and timings? You have given directions for  
25 a hearing on the parent companies potentially and season tickets issues, at  
26 the end of January/start of February. We will need to renew our application

1 for permission to appeal to the Court of Appeal, which will then need to  
2 consider it. I think usually they say that it takes them up to three months, but  
3 often one finds that it's quicker. We should not be required to plead back, in  
4 any event, to any part of the claim forms before that hearing happens in  
5 January/February. It would not make sense for us to plead just to parts of the  
6 claim form and not the rest of it. So, actually the lost time from granting a stay  
7 pending the determination of permission to appeal is likely to be relatively  
8 limited if we don't get permission to appeal, because that's likely to come in at  
9 probably around the same time as that later hearing. If we do get permission  
10 to appeal from the Court of Appeal, there should definitely be a stay, in my  
11 submission, pending the hearing before the Court of Appeal.

12 So, given the directions that Tribunal has made, the application for a stay, in my  
13 submission, makes more practical sense than it ever did before.

14 **MR JUSTICE ROTH:** But the concern is suppose that permission to appeal is  
15 refused by the Court of Appeal, then no doubt you will say: oh, we have not  
16 done any work on our defence, now we want another two months to work on  
17 our defence because we have not spent December or January doing it  
18 because we were waiting to see what happens. So there might be -- I can  
19 understand the point that you would like to know whether season tickets are  
20 included or excluded, or so on, before doing a defence and that might argue  
21 in favour of putting the time for defence to a slightly later date. But to make  
22 the whole thing only start -- time for defence to run from the decision on  
23 permission to appeal could, potentially, give rise to another two to three  
24 months' delay.

25 **MS ABRAM:** We would certainly say we should be given material time after the  
26 hearing of the season tickets application before defences have to go in. That

1 is certainly right, and so I accept, as I must, that you can cut the point various  
2 different ways. You can set a long date now or you could wait until that  
3 hearing to set the appropriate date. In my submission, the latter is the better  
4 course.

5 **MR JUSTICE ROTH:** Yes.

6 Mr Harris.

7  
8 **Submissions by MR HARRIS**

9 **MR HARRIS:** Just briefly, I adopt the submissions of Mr Ward and Ms Abram and  
10 I had -- I guess the point is just to confirm as a matter of fact that we haven't  
11 begun work on our substantive defence, and one of the reasons can be tested  
12 in this way. Imagine that we had won the CPO application and the CPO  
13 application had been dismissed, and then we had put in a cost bill that said:  
14 oh, by the way, we have also been working on our completely otiose  
15 substantive defence; well, that would have all been disallowed, and quite  
16 properly so.

17 **MR JUSTICE ROTH:** Yes, thank you.

18 Mr Moser, do you want to reply briefly?

19  
20 **Reply submissions by MR MOSER**

21 **MR MOSER:** Briefly, in relation to my learned friend, Mr Ward, we have confidence  
22 in the findings of the Tribunal, both in the judgment and on permission, and so  
23 we think the risk he addresses is therefore slight to us.

24 The question of document retention I mentioned was of course not his documents, it  
25 was the class members' documents. So that's a different point. This is  
26 about -- the point that was being made at the hearing, you will recall, was: oh

1 well, people will have to produce some evidence and so on; and how long are  
2 bank statements kept and all that sort of thing.

3 **MR JUSTICE ROTH:** Yes.

4 **MR MOSER:** Which the defendants were saying is all fading into the mists of time.

5 **MR JUSTICE ROTH:** Yes.

6 **MR MOSER:** So it's not that we have no pressure of time at all.

7 As far as disclosure is concerned, I am happy to confirm the Tribunal's impression  
8 that, no, we are not asking for disclosure to happen at the same time. That's  
9 not part of what we are suggesting and there's no order for disclosure in the  
10 Draft Order.

11 On Ms Abram's timetable, if one considers carefully what Ms Abram is saying, she is  
12 saying that she cannot or she does not wish to start until the Court of Appeal  
13 has decided. Well, that would be in three months' time. Of course it won't  
14 actually be in three months' time, it will be after time when we've received the  
15 Tribunal's written reasons; and then they've put in their application to the  
16 Court of Appeal within the time that's allowed for that later; and then be  
17 whatever it is, three months or so, so we are actually looking at half a year  
18 down the line.

19 **MR JUSTICE ROTH:** You may or may not, depending how quickly -- but  
20 I appreciate the point -- and there is the Christmas vacation.

21 **MR MOSER:** Indeed, so we are talking about considerable delay.

22 **MR JUSTICE ROTH:** Yes.

23 **MR MOSER:** We think, having explained our position on risk, that we wish to renew  
24 our request that pleadings do proceed.

25 **MR JUSTICE ROTH:** Yes. Thank you. We will consider that and therefore  
26 metaphorically retire for a few moments. **(Pause)**

1 (11.30 am)

2 (A short break)

3 (11.44 am)

4

5 **Decision by THE TRIBUNAL**

6 **MR JUSTICE ROTH:** We see force in the submission that defences should come

7 after any application to amend to introduce season tickets is determined, but

8 subject to that, we will not grant a stay on pleadings. So we think that it's

9 a question now of fixing a date for defences. We think it should be three

10 weeks after the ruling on season tickets, if there is an application to amend

11 and introduce season tickets, but that is on the basis that everything else can

12 be worked on in the meantime and that is not really adding much.

13 But we need a date for defences on the basis there is no application to introduce

14 season tickets. The proposal by the claimant is 14 January. We think that's,

15 having heard from the defendants about what work they have done or have

16 not done on defences, is a bit too early, but we don't want to delay it for too

17 long.

18 So it's a question of what date for defences can be put in. We were thinking in terms

19 of the end of January, but we'd like to know from the defendants whether the

20 end of January is a sensible time.

21 Ms Abram.

22

23 **Submissions by MS ABRAM**

24 **MS ABRAM:** I think this one is for me to go first on, sir.

25 We ask for 12 weeks from now to produce defences, which will be Friday,

26 11 February, so I think two weeks later than the date you have in mind, sir,

1 and four weeks later than the date the PCR was pitching for.

2 The reason we ask for 12 weeks is that that is, essentially, ten weeks plus  
3 two weeks for the Christmas period. I would also emphasise, particularly from  
4 Stagecoach's perspective, we are obviously a very lean legal team, with  
5 limited external resources, and also limited ability to call on internal business  
6 resources because we are no longer a TOC, and so getting to the bottom of  
7 the claim is going to be an exercise that we have not started yet and that is  
8 going to take some time.

9 I would also ask you to take into account the fact that wrapped up in whatever period  
10 the Tribunal sets will be the two-week period, whenever that starts and ends,  
11 for us to put in our appellant's notice to the Court of Appeal. Effectively, on  
12 the counsel team side, at present it's a team of one and so resources are  
13 extremely limited, and so for those reasons I would ask for 11 February, which  
14 is only two weeks longer than I think you have in mind, sir.

15 **MR JUSTICE ROTH:** Yes.

16 Mr Ward.

17 **MR WARD:** Sir, thank you. I adopt that.

18 **MR JUSTICE ROTH:** Thank you.

19 Mr Harris.

20  
21 **Submissions by MR HARRIS**

22 **MR HARRIS:** Sir, can I ask for one additional week for the same reasons that I had  
23 a slight degree of leniency on the other matter, so in our case I think that  
24 would make it 18 February?

25 **MR JUSTICE ROTH:** Mr Moser.

1 **Submissions by MR MOSER**

2 **MR MOSER:** I am not going to argue over a few weeks, sir. I am in the Tribunal's  
3 hands, but if the Tribunal is attracted by Ms Abram's date, we are happy with  
4 11 February. It seems suboptimal somehow to have different times for  
5 different defendants. Each defendant has its own constraints. I don't want to  
6 sound unfair to Mr Harris' clients, but one would have thought that  
7 11 February, which is almost a month after our suggested date, ought to be  
8 ample time for everyone.

9 **MR JUSTICE ROTH:** Yes. Thank you. We'll just take a moment. **(Pause)**

10  
11 **Decision by THE TRIBUNAL**

12 **MR JUSTICE ROTH:** We can understand, Mr Harris, that at the moment while  
13 things are in transition, you need some extra time for what has to happen in  
14 the next few weeks, but we think 11 February is far enough away that it  
15 should apply to your clients as much as to the other two defendants. So  
16 defences by 11 February, unless there is an application to amend regarding  
17 season tickets, in which case defences three weeks after the ruling on that  
18 application if it should be any later than 11 February.

19 Reply, Mr Moser, I think you asked for six weeks in your proposed order, so that  
20 would mean 25 March.

21 **MR MOSER:** We are happy with that.

22 **MR JUSTICE ROTH:** Yes. Then I think that deals with pleadings. We are not going  
23 to, I think, list a second CMC -- direct a second CMC at the moment. There  
24 will then be a need for a CMC to deal with further progress and that will  
25 depend by then you will know what's happening regarding appeals.

26 The one other matter raised by Ms Abram is about the costs budget. As you know,

1 in the authorisation of the class representative, we considered the likely costs  
2 and what funding the class representative has arranged. It does appear that  
3 the estimates in the cost budget are being exceeded, and we think it's  
4 appropriate for that reason to direct an updated cost budget, Mr Moser, and  
5 presumably that is something your solicitors have a firm handle on; and can  
6 that be produced in two weeks?

7 **MR MOSER:** I am sure there is a firm handle on this; may I just take instructions for  
8 a moment?

9 **MR JUSTICE ROTH:** Yes. **(Pause)**

10 **MR MOSER:** If I may be permitted an observation.

11 **MR JUSTICE ROTH:** Yes.

12 **MR MOSER:** Something that's been pointed out to me, that the reasons for the  
13 greater costs have been that there have been more hearings; there have  
14 been more arguments; there have been -- as the Tribunal is aware, there  
15 have been arguments taken on every single point. Even though we have  
16 won, the defendants at the time -- the prospective defendants, proposed  
17 defendants, opposed us on every single aspect, all of which had to be  
18 responded to. And of course we had the vagaries of litigation that involved  
19 *Merricks*, and the re-pleading and so on, which have to be borne. It does not  
20 mean we have to bear it, but it all increased the cost. There's no danger,  
21 ultimately, of the thing being unfunded because there is the long-stop of the  
22 100 per cent CFA.

23 We can produce such a schedule, but of course what it is going to do is it's only  
24 going to look now retrospectively. We have no much better view of what is  
25 happening going forward, and there is a slight imbalance in a case where --  
26 it's not as though this is a cost budgeted case --

1 **MR JUSTICE ROTH:** Yes.

2 **MR MOSER:** -- or a budget managed by the court. We have to keep producing  
3 these breakdowns and the other side do not. There is a slight question of  
4 fairness.

5 Having said all of that, we can of course produce an updated schedule, sir. We  
6 gently suggest that the Tribunal might just want to reconsider whether that is  
7 something that is really just and necessary at this point, when --

8 **MR JUSTICE ROTH:** If it is simply the case that the costs of the CPO application  
9 are higher than anticipated, significantly higher for the reasons you have  
10 explained, but you are saying that there is no revision to the costs going  
11 forward for trial, subject to one point which I will mention, then a revised cost  
12 budget will not serve any purpose. It's only whether the experience that you  
13 have had of what has happened in the CPO means that you now think that  
14 there is substantial revision --

15 **MR MOSER:** It's the former --

16 **MR JUSTICE ROTH:** -- for the cost budget going forward.

17 **MR MOSER:** It's the former, sir. That's why I gently question the purpose of this.

18 **MR JUSTICE ROTH:** Well, then it may be -- sorry to cut across you, but the one  
19 thing that could change matters is if you are given permission to amend to  
20 add additional defendants and the additional defendants are separately  
21 represented, on one view, that doesn't change your costs. It means that the  
22 total defence costs go up, but inevitably, you then have to correspond with  
23 additional solicitors; you have to perhaps reply to additional defences and so  
24 on. But on that basis, it would be more sensible, it seems to me, to wait until  
25 we see what happens regarding the additional defendants. But if you say on  
26 instructions that there is no substantial revision to the estimates going forward

1 to trial, and it is the costs incurred so far which we can see, then --

2 **MR MOSER:** That is it, yes.

3 **MR JUSTICE ROTH:** Yes. I understand.

4 Ms Abram, that is what we have been told and it's now on the record. On that basis,  
5 it does not seem to us -- to me I should say -- sensible to require a new cost  
6 budget to be put in because we can see what has happened.

7  
8 **Submissions by MS ABRAM**

9 **MS ABRAM:** I will, if I may, respectfully try and persuade you to the contrary, sir.

10 I think there are three points here. The first is: what purpose does the cost budget  
11 serve? And we are extremely concerned about the massive costs overrun.  
12 We only know about the costs overrun in respect of what has happened so  
13 far, as to the period between June 2019 and March 2021, because that is the  
14 period to which the cost claim relates.

15 Mr Moser says that there is no costs overrun in respect of the forward looking costs,  
16 but we don't know about the period either between March 2019, when the cost  
17 budget was produced, and June 2019, when the cost claim starts, or between  
18 March 2021 and today. So, I would be willing to wager that there are  
19 additional costs that have been incurred during both of those periods.

20 I say, as a matter of principle, it's important that the Tribunal should know that what  
21 costs have been incurred, as well as what costs are expected to be incurred  
22 in CPO, so it can exercise its proper supervisory function.

23 That also really matters when we are about to head off to the Court of Appeal, where  
24 a challenge to, with respect, the Tribunal's cost benefit analysis, which was  
25 reached on the basis of an earlier iteration of the document, which was  
26 already out of date by the time the CPO came to this Tribunal is in prospect.

1 It's really important for that appeal that we should be able to say to the Court  
2 of Appeal: look, this is the current position. I would respectfully ask the  
3 Tribunal to facilitate that, in finding out what the current position is.

4 The second point is that we don't have an order for cost management yet in these  
5 proceedings, but the eye-watering level of the costs that have been incurred  
6 strongly suggests to my clients that if these proceedings are to go forward,  
7 then this is a case where cost management and cost budgeting will be critical,  
8 and so it will be an important foundation for that application as well.

9 The third point that I would just make is what the Tribunal might take from my first  
10 two points, that what the PCR really needs to do is submit a revised costs  
11 budget now that shows the increase in costs already incurred, as compared to  
12 the early 2019 costs budget. He does not need to look again at the  
13 forward-looking costs. In my submission, that's the very least that he needs to  
14 do because we know that the costs budget is wrong and it's not acceptable  
15 that it should remain a document before the Tribunal when we know it's out of  
16 date.

17 But in my submission, it would also be appropriate to look -- to require the PCR to  
18 look at whether, in view of his experience over the last nearly three years, the  
19 costs for the forward-looking phases, like disclosure, witness statements, are  
20 reflective, not only of their expectations as to the amount of work to be done,  
21 but also as to the hourly rate at which that work is to be done, which on the  
22 Hausfeld side, we can see have gone up very considerably. So, unless the  
23 amount of time to be taken is somehow reduced, the hourly rates now seem  
24 to be greater. So, for that reason alone, one would expect the budgeted  
25 expected sums to be more. So, for all those reasons --

26 **MR JUSTICE ROTH:** Yes. I have not done a comparison. You are saying the

1 hourly rates we now see in the costs which are part of the current application  
2 for costs --

3 **MS ABRAM:** Yes.

4 **MR JUSTICE ROTH:** -- are significantly higher than the hourly rates used in the  
5 costs budget; that is your point, is it?

6 **MS ABRAM:** That's my point. And I can either take you to the document -- I am not  
7 sure what documents you have in front of you --

8 **MR JUSTICE ROTH:** We have the revised statement of costs, supporting the  
9 application for costs which sets out hourly rates.

10 **MS ABRAM:** So sorry, sir, I am overspeaking.

11 **MR JUSTICE ROTH:** I have that.

12 **MS ABRAM:** I am grateful. If one takes the hourly rates that are in that table, one  
13 sees that the fee earner partner, grade A, is to be charged now between £600  
14 and £750 an hour. Now, according to the costs budget, grade A is £500 to  
15 £700 per hour. I can give you the bundle reference for that if you have the  
16 CPO bundles in front of you, but if not, I can just read them out.

17 **MR JUSTICE ROTH:** No, I haven't.

18 **MS ABRAM:** So grade A was in the cost budget £500 to £700 per hour; grade B in  
19 the revised cost schedule is £425 to £500, and in the original costs budget is  
20 £325 to £425. Grades C and D in the revised cost schedule are between  
21 £150 and £375. I put them that way because they are a combined figure in  
22 the cost budget and they are £175 to £330 in the cost budget. So that's not  
23 so much a point of increased hourly rates; it's just a lack of transparency in  
24 the ability to compare the hourly rates between the two.

25 **MR JUSTICE ROTH:** I think in the revised statement of costs it's £150 to £375.

26 **MS ABRAM:** Yes, I am sorry, did I misspeak?

1 **MR JUSTICE ROTH:** I think you said £175 to £375 -- yes, so that's not changed, it's  
2 just -- but the top two have changed. Yes, I see. Right. It's a point that was  
3 made by you, I think, asking for a revised cost budget, so it does not seem,  
4 unless there are howls of desire, that we need to call on the other defendants  
5 on this point. I think we, again, will just take a moment to confer. **(Pause)**  
6

7 **Decision by THE TRIBUNAL**

8 **MR JUSTICE ROTH:** We can see the sort of force in both sides of this debate. We  
9 think that the sensible course is the claimant is not required to produce  
10 a revised cost budget now. We can see, in very broad terms, the effect of the  
11 increase in hourly rates on the budget that was prepared before, but we think  
12 that after the applications to add additional defendants are determined at that  
13 point, a revised cost budget should be produced because we think the  
14 addition of further parties is going to impact on the cost assessment. And that  
15 obviously was not reflected in the original cost budget, and at that point  
16 everything can be brought up-to-date.

17 That is going to be revisited once we deal with the amendment applications, but you  
18 are on notice, Mr Moser, and those who instruct you, that it will be required  
19 after the amendment application is determined.

20 **MR MOSER:** On the assumption that further parties are added. If not, obviously --

21 **MR JUSTICE ROTH:** We shall consider it generally at that point.

22 **MR MOSER:** Yes.

23 **MR JUSTICE ROTH:** Is there anything else for today?

24 **MR MOSER:** There is for today the question of the domicile date, but perhaps that's  
25 agreed, I don't know. The one that we suggested, again following *Le*  
26 *Patourel*, was the date of judgment.

1 **MR JUSTICE ROTH:** Yes. Is that resisted by anyone? No? We are content with  
2 that.

3 **MR MOSER:** Then there is nothing further in oral today.

4 **MR JUSTICE ROTH:** We have of course the costs application, which we will be  
5 ruling on.

6 Ms Abram.

7 **MS ABRAM:** Just on costs, sir, obviously the costs of today should be costs in the  
8 case, but I just put down a note that there will also be the question of the  
9 costs of the amendment to the claim form. I am not suggesting that that  
10 should be or could be determined today because lots of them are being held  
11 over to the parent company and season ticket issues, but could they be  
12 carved out of the general CMC costs order for costs in the case and that be  
13 reserved?

14 **MR JUSTICE ROTH:** Yes, I have not been through the amendments in detail.  
15 Obviously, the season ticket amendment will depend on -- it does not now  
16 arise and will depend on -- that's a separate application with its own ruling on  
17 costs. The other amendments I thought are, essentially, bringing matters  
18 up-to-date and are not matters where ... yes.

19 **MR MOSER:** Sir, if I may --

20 **MR JUSTICE ROTH:** I have not looked at them, is the short answer.

21 Yes, Mr Moser.

22 **MR MOSER:** If I may, and I understand, sir, if you have not looked at it, you may  
23 want to take it away, but my reaction to Ms Abram on this occasion is that  
24 would not be an orthodox way of looking at this kind of amendment. This isn't  
25 an amendment in the way you get in ordinary litigation, where you say: oh,  
26 I have suddenly thought of something else or I need to change this or that.

1 And then there is a question of who pays for that. This is simply the next  
2 stage of the collective procedure. And matters have been brought up-to-date.  
3 These are housekeeping vanilla amendments, and so they are par excellence  
4 the sort of amendments that are costs in the case. I just say that. Obviously,  
5 I am not going to press the Tribunal to decide that this instant.

6 **MR JUSTICE ROTH:** I think we need to really look at them if there is going to be  
7 argument about that, which for my part I have not done, to assess where they  
8 are. We've given you permission to make that amendment, excluding  
9 obviously the season tickets and we can reserve the costs of that  
10 amendment.

11 **MR MOSER:** Yes.

12 **MR JUSTICE ROTH:** And deal with them subsequently, and the costs of this  
13 hearing should be costs in the case, I think.

14 **MR MOSER:** Yes.

15 **MR JUSTICE ROTH:** Is there anything from anyone else?

16 **MR WARD:** Sir, just --

17 **MR JUSTICE ROTH:** Mr Ward first, and then Mr Harris.

18 **MR WARD:** Thank you. We have some further minor points on the form of the  
19 notice. As it is not being issued today, we would be happy to take those up in  
20 correspondence, rather than trouble you with them.

21 **MR JUSTICE ROTH:** That seems very sensible. Thank you. Obviously, if you can't  
22 agree, then we can have written submissions, or it can be mentioned when  
23 we have the further hearing on the amendment. But as you say, no notice is  
24 now going out.

25 Mr Harris.

26 **MR HARRIS:** Yes, two minor points. Just for the sake of good order, I think you

1 said a moment ago that my learned friend, Mr Moser, could have permission  
2 for the amendments bar the season tickets, but strictly speaking, he has not  
3 succeeded yet in his application for parent companies. And there are some  
4 amendments in there regarding parent companies, so I think strictly speaking,  
5 he doesn't have permission for those ones either as at today.

6 **MR JUSTICE ROTH:** Right. I don't think -- the parent companies are not parties  
7 to -- the amended claim form I am looking at does not include the parent  
8 companies.

9 **MR MOSER:** No, the situation is that we have included in square brackets some  
10 parts of the parent companies for which we do not yet seek permission,  
11 strictly speaking.

12 **MR HARRIS:** I see.

13 **MR MOSER:** So we have not sought that. We are not going to get it today, but they  
14 are there in case we get permission or it's agreed that parent companies  
15 come in, so that everybody knows what that is by way of pleading.

16 **MR JUSTICE ROTH:** Yes, I see.

17 **MR HARRIS:** That matter has been helpfully clarified. No permission is sought for,  
18 amongst other things, paragraphs 84(b), (c), et cetera, the ones in square  
19 brackets. That's the first point.

20 Then the second point is just so that the Tribunal knows, there was an additional  
21 letter regarding costs from my learned friend Mr Ward's solicitors,  
22 Slaughter and May, last night, and I just want to be sure -- I suspect  
23 Ms Abram may know more about this than me in terms of the detail, should  
24 you need to know any detail -- but I just want to make sure your Lordship and  
25 the members of the Tribunal have those in mind when considering the written  
26 outcome on costs because they are material.

1 **MR JUSTICE ROTH:** Yes. That's a letter dated 17 November, is it?

2 **MR HARRIS:** Yes, that's right.

3 **MR JUSTICE ROTH:** We will make sure that we have that and consider it.

4 **MS ABRAM:** It's at the very end of the correspondence bundle, if that's of

5 assistance, sir.

6 **MR JUSTICE ROTH:** Right. We will make sure we take that into account and we

7 will -- whether we provide the ruling on costs together with the ruling on

8 permission to appeal in one judgment or we do them separately I don't know.

9 We are obviously keen to get the ruling on permission to appeal out very

10 quickly.

11 **MR MOSER:** Sir, if I may, on that letter that Mr Harris mentions, which I had thought

12 was not copied to the Tribunal, but it is apparently in the bundle, that arrived,

13 as far as I am concerned, at about 10.30 last night. It contains more toing and

14 froing about the schedule of costs, which is of course only there as a guide for

15 any payment on account.

16 **MR JUSTICE ROTH:** Mm-hmm.

17 **MR MOSER:** So it's of limited interest, largely, anyway for this purpose. But if the

18 Tribunal is going to look at that letter, may we be given a short time, say

19 12 o'clock tomorrow, Friday, just to put in our response to that letter?

20 Because some of the things in the letter, just mistaken speculation so, for

21 instance, are there figures post-1 July --

22 **MR JUSTICE ROTH:** Yes, you can put in a response by 12 o'clock tomorrow --

23 **MR MOSER:** I am grateful. It will be very short.

24 **MR JUSTICE ROTH:** -- we'll look at that as well.

25 **MR MOSER:** Thank you.

26 **MR JUSTICE ROTH:** Anything else? Thank you -- just one moment. Obviously,

1 not dealing with the costs matter that we are still to decide, could you, please,  
2 Mr Moser, prepare a revised Draft Order --

3 **MR MOSER:** Yes.

4 **MR JUSTICE ROTH:** And circulate that to the defence counsel and then submit it to  
5 us, we hope in agreed form?

6 **MR MOSER:** Yes.

7 **MR JUSTICE ROTH:** That concludes this hearing. Thank you all very much.

8 **MR MOSER:** Thank you very much.

9 **(12.22 pm)**

10 **(The hearing concluded)**

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### Key to punctuation used in transcript

|              |  |
|--------------|--|
| --           | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking  |
| ...          | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.   |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| -            | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?  |